Agreeing to Arbitrate: Equal Rights for Older Workers

I. INTRODUCTION

Compulsory arbitration of age discrimination claims under individual employment contracts does not conflict with the legislative intent of the Age Discrimination in Employment Act (ADEA)[1] and therefore should be upheld as consistent with the Supreme Court's clear mandate to enforce arbitration agreements. The Third Circuit's decision in *Nicholson v. CPC International, Inc.*[2] and legislation recently introduced in Congress[3] both misconstrue the purpose of the ADEA with respect to arbitration and waiver agreements. An individual employment agreement to arbitrate all disputes, entered into voluntarily and knowingly, must be upheld to protect the intent of the parties and their freedom to contract. In contrast to a waiver agreement, under an agreement to arbitrate an employee is merely agreeing to settle the dispute through arbitration, rather than waiving his or her rights under the dispute.

In *Nicholson*, the plaintiff was hired by CPC International, Inc. (CPC) in 1957 as an attorney, and was eventually promoted to Vice-President for Corporate Financial Services in 1981. In 1986, apparently in anticipation of a possible takeover move, all corporate officers were presented with an executive employment agreement, which Nicholson signed. The agreement included the following arbitration clause:

> Any dispute or controversy arising under or in connection with this Agreement shall be settled exclusively by arbitration, conducted before a panel of three arbitrators in New York City in accordance with the rules of the American Arbitration Association then in effect. Judgment may be entered on the arbitrators' award

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1. 29 U.S.C. §§ 621-634 (1988) (defining "age" as 40-65), *as amended* by the Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256 (age limit raised to 70 for nonfederal employees and removed entirely in covered federal employees), and by the Act of Oct. 31, 1986, Pub. L. No. 99-592 (removed upper age limit for almost all covered employees).

2. 877 F.2d 221 (3d Cir. 1989).

3. S. 54, 101st Cong., 1st Sess. (1989). H.R. 1432, 101st Cong., 1st Sess. (1989) [hereinafter *Bills*] (both bills would have curtailed firms' use of waivers to protect themselves from workers' suits under the ADEA). Neither bill was enacted and no similar bills are now being considered by Congress.

> in any court having jurisdiction. The expense of such arbitration shall be borne by the Company.[4]

Approximately one year later Nicholson was informed that his position was being eliminated in a corporate restructuring. He filed a timely age discrimination charge with the Equal Employment Opportunity Commission (EEOC) and subsequently filed a private action. The district court denied CPC's motion for an order to compel arbitration and the court of appeals affirmed.

By analyzing court decisions about arbitration agreements in the commercial setting and employment disputes, the language and legislative history of the ADEA, and public policy concerns, this Note will discuss why the *Nicholson* court erroneously failed to enforce a legitimate agreement to arbitrate.

II. ARBITRATION AGREEMENTS IN COMMERICAL TRANSACTIONS

In considering the viability of agreements to arbitrate employment disputes involving ADEA claims, both the courts and Congress should look at the Supreme Court's recent decisions concerning arbitration of claims in the commercial setting. In *Shearson/American Express, Inc. v. McMahon*,[5] the Court said that the Federal Arbitration Act (FAA)[6] establishes a federal policy favoring arbitration that the courts must enforce.[7] The Court upheld an arbitration clause on claims under § 10(b) of the 1984 Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act (RICO). The Court emphasized that "this duty to enforce arbitration agreements is not diminished when a party bound by an agreement raises a claim founded on statutory rights."[8] Instead, the Court put the burden on the party opposing arbitration to show that Congress intended to preclude waivers of judicial remedies for the statutory rights at issue.[9] Thus, under the test for arbitration set forth in *McMahon*, Nicholson, the employee, had the burden to demonstrate that Congress intended to make an exception to the Arbitration Act for claims arising under the ADEA in order to avoid compulsory arbitration under the agreement he signed with his employer.

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4. Nicholson v. CPC Int'l Inc., 877 F.2d 221, 223 (3d Cir. 1989).

5. 482 U.S. 220 (1987).

6. 9 U.S.C. §§ 1-14 (1982) (§ 2 declares as a matter of federal law that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

7. Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 226 (1987).

8. *Id.*

9. *Id.* at 227.

In *Gilmer v. Interstate/Johnson Corp.*,[10] the Fourth Circuit applied the *McMahon* test and upheld an agreement to arbitrate ADEA claims. The court stated that "we find no congressional intent to preclude enforcement of arbitration agreements in the ADEA's text, its legislative history, or its underlying purposes . . . ."[11] The court interpreted *McMahon* as holding that "[a]n arbitration agreement is unenforceable only if Congress has evinced an intention to preclude waiver of the judicial forum for a particular statutory right, or if the agreement was procured by fraud or use of excessive economic power."[12]

The Supreme Court upheld the arbitrability of claims arising under the Sherman Act in the international commerce setting in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[13] "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum."[14] The Court indicated that the parties' bargain to arbitrate should be upheld unless the party opposing arbitration of the claim could prove congressional intent to the contrary.

In a recent case on the subject, *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[15] the Court again upheld the enforceability of arbitration agreements, this time under the Securities Act of 1933. In reiterating the federal policy favoring arbitration as a means of securing prompt, economical and adequate solution of controversies,[16] the Court said that predispute agreements to arbitrate claims under the Securities Act of 1933 are enforceable, absent fraud or overwhelming economic power that would provide grounds for the revocation of the contract. In explaining its decision, the Court said that arbitration agreements, like forum-selection clauses, "advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."[17]

These recent decisions by the Supreme Court indicate a strong presumption in favor of enforcing arbitration agreements in the commercial setting, which should be extended to the employment area.

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10. 895 F.2d 195 (4th Cir. 1990), *cert. granted*, 111 S. Ct. 41 (1990).

11. *Id.* at 196.

12. *Id.* at 196-97 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 627-28 (1985) and Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987)).

13. 473 U.S. 614 (1985).

14. *Id.* at 628.

15. 490 U.S. 477 (1989).

16. *Id.* at 479-80.

17. *Id.* at 482-83.

III. ARBITRATION IN EMPLOYMENT DISPUTES

Arbitration agreements in employment contracts hold many of the same benefits sanctioned by the Court in the commercial arbitration cases discussed above. In his strong dissent in *Nicholson*, Judge Becker commented on the applicability of arbitration to employment disputes. He pointed out that arbitrators have broad equitable and remedial powers and that waivers must be knowing and voluntary to be enforceable.[18] He argued that traditional suspicion of arbitration as a method of weakening the protections afforded by substantive law are inconsistent and out-of-step with the judiciary's current, strong endorsement of federal statutes favoring arbitration to resolve disputes.[19] He also pointed out that if the Supreme Court has approved of the use of arbitration involving the factual and legal complexities of antitrust and securities claims, certainly ADEA claims do not involve more complex matters than arbitrators can handle.[20]

In deciding the arbitration issue, the court in *Nicholson* looked first to the text of the ADEA. The statute does not contain explicit language as to the effect of an arbitration agreement on ADEA rights. The ADEA puts enforcement power in the EEOC. Thus, a claimant must first file an administrative complaint with the EEOC and wait sixty days until the agency considers the charge before he can file a suit.[21] The ADEA must be enforced pursuant to the Fair Labor Standards Act (FLSA).[22] This requirement led to the court's discussion as to whether ADEA claims should follow precedents set in FLSA cases involving collective bargaining agreements.

The *Nicholson* court tried to draw analogies between ADEA cases and those decided under FLSA, Title VII, and 42 U.S.C. § 1983. In a case involving race discrimination, the Supreme Court held in *Alexander v. Gardner-Denver Co.*[23] that Title VII rights are not waivable by a collective bargaining agreement to arbitrate disputes.[24] In *Barrentine v. Arkansas-Best Freight System, Inc.*,[25] the Supreme Court held that wage disputes involving FLSA rights are not waivable by a collective bargaining agreement. In addition, arbitration decisions were held to have no

18. Nicholson v. CPC Int'l Inc., 877 F.2d 221, 240-41 (3d Cir. 1989) (Becker, C.J., dissenting).

19. *Id.* at 234.

20. *Id.*

21. 29 U.S.C. § 626(d) (1988).

22. Fair Labor Standard Act of 1938 § 1, *as amended by* 29 U.S.C. §§ 201-219 (1982).

23. 415 U.S. 36 (1974), *cert. denied*, 423 U.S. 1058 (1976).

24. *See also* Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, 110 S. Ct. 143 (1989).

25. 450 U.S. 728 (1981), *cert. denied*, 471 U.S. 1054 (1985).

preclusive effect on § 1983 claims in federal courts in *McDonald v. City of West Branch*.[26]

ADEA cases can be clearly distinguished from these cases for several reasons. First, FLSA cases often involve collective bargaining agreements. In those cases, courts may be more likely to provide protections of claimants who did not individually or voluntarily submit to a binding arbitration agreement. Binding arbitration was instead agreed to between the union and the employer, perhaps even without the employee's actual knowledge. As Judge Becker pointed out in his *Nicholson* dissent, the Supreme Court's rationale in these cases may have been based on distrust of unions and the fear that a union's control over the arbitral process could lead to loss of an individual's rights.[27] None of the cases discussed above involved an individual agreement between an employer and an employee, which was the situation in the *Nicholson* case. Furthermore, *Nicholson* involved an agreement-to-arbitrate case, which can be clearly distinguished from the waiver cases. A waiver is "the intentional or voluntary relinquishment of a known right."[28] This case involves an arbitration clause which is "a clause inserted in a contract providing for compulsory arbitration in case of dispute as to rights or liabilities under such contract."[29]

Commentators and the courts seem to disagree in ADEA cases as to the application of the Supreme Court's prohibition of waivers and agreements to arbitrate in certain Title VII, FLSA, and § 1983 cases, especially in light of the Supreme Court's vigorous approval of arbitration agreements in the commercial setting. Several commentators feel arbitrators may be better able than courts to deal with disturbances in employment relationships, because of arbitrators' expertise "for understanding and seeing the complexity in human interactions, and making and conditioning decisions in such a way as to make long-term interactions viable."[30] These commentators state that "[c]ourts have been less adept . . . in responding to events which are merely symptoms of some continuing underlying disturbances in personal relationships."[31] Thus, arbitrators may indeed be better suited than courts to deal with cases in which an age-protected claimant, who was in a long-term

26. 466 U.S. 284 (1984).

27. Nicholson v. CPC Int'l Inc., 877 F.2d 221, 235 (3d Cir. 1989) (Becker, C.J., dissenting).

28. BLACK'S LAW DICTIONARY 1417 (5th ed. 1979).

29. *Id.* at 96.

30. Clark & Bush, *Arbitration of Employment Discrimination Claims: A Need for Statutory Reform?*, 11 T. MARSHALL L. REV. 47, 55 (1985).

31. *Id.* at 54.

relationship with an employer, seeks to rescind an agreement to arbitrate and files an ADEA claim.

Another commentator suggests that congressional preference for informal, out-of-court solutions to problems of employment discrimination is even more practical in ADEA cases where the outcome is highly uncertain. He states that "incorporation of Title VII's conciliation provision [into ADEA] should . . . be interpreted as reflecting a favorable attitude toward *all* recognized mechanisms of out-of-court dispute resolution, including private waiver."[32]

The courts are split in regard to the waivability of ADEA claims and the effect of agreements to arbitrate. These discrepancies must be resolved by the Supreme Court or Congress in order to allow both employers and employees some predictability as to the effectiveness of the voluntary agreements they sign. In 1989, two bills put before Congress, S. 54 and H.R. 1432,[33] sought to curtail employers' use of waivers to protect themselves from workers' suits under the ADEA. The House bill would have allowed waivers only if the waivers were supervised by a court or part of a bona fide age discrimination claim filed with the EEOC, in court, or submitted in writing to an employer. The Senate bill would have allowed waivers only if they are supervised by the EEOC. Neither bill was enacted and no similar proposals are now before Congress. Furthermore, neither bill specifically dealt with the question of agreements to arbitrate.

Agreements to arbitrate ADEA disputes were upheld in *Gilmer*, where the court stated that "arbitration is a forum selected by mutual agreement of the parties. Congress' choice of an enforcement scheme in which ADEA suits are brought in a judicial forum simply does not manifest an intention to prevent parties from reaching a private contractual agreement to submit their disputes to arbitration."[34] In October, the Supreme Court granted certiorari on *Gilmer* with regard to the question of whether claims brought pursuant to the ADEA are subject to compulsory arbitration.

In *EEOC v. Cosmair, Inc.*, the Fifth Circuit upheld the waiver of employee rights to file private ADEA lawsuits and rights to recover in suits brought by the EEOC on employee's behalf.[35] However, that court held that the waiver of the right to file the EEOC charge is void as against public policy. The court explained that the function of an ADEA charge is to put the EEOC on notice of a possible violation, not to initiate

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32. Comment, *Waiver of Rights Under the Age Discrimination in Employment Act of 1967*, 86 COLUM. L. REV. 1067, 1079 (emphasis in original).

33. *See Bills*, *supra* note 3.

34. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 199 (4th Cir. 1990).

35. 821 F.2d 1085 (5th Cir. 1987).

a lawsuit.[36] Thus, the court upheld the validity of a private, unsupervised waiver of an ADEA cause of action by an employee as long as the waiver was "voluntary and knowing." The *Cosmair* court properly upheld the right of private parties to make agreements and still protected the public policy interests of EEOC enforcement of the ADEA claims.

In *Gilmer*, the court found that the EEOC's continued effectiveness was not dependent on its participation in the resolution of all claims under ADEA. The court went on to state that:

> We are reluctant to conclude that the mere fact of administrative involvement in a statutory scheme of enforcement operates as an implicit exception to the presumption of arbitral availability under the FAA [Federal Arbitration Act]. . . . [T]he roles of arbitration and the EEOC are harmonious because neither the filing of an individual charge nor an action of agency enforcement is in any way forbidden by the election of arbitration.[37]

In *EEOC v. United States Steel Corp.*,[38] a district court found that a company policy requiring employees to sign waiver agreements as a condition to receiving specified retirement pensions was not proper because of its "chilling effect" on those who filed ADEA charges, as well as those who had not, and because the waivers were not voluntary and knowing regardless of whether they were part of a settlement.[39] However, in analogizing ADEA to Title VII claims, the court did recognize that an employee could waive a cause of action as part of a settlement if the employee's consent was "voluntary and knowing."[40] Among the factors the court found dispositive of the voluntary and knowing requirement were degree of negotiations, presence or absence of counsel, explanation or lack of explanation with respect to release, and straightforwardness or ambiguity of the language of the release. These factors should be applied to all ADEA arbitration and waiver cases, as opposed to the *per se* prohibition declared by the *Nicholson* court.

The Sixth Circuit put forth the strongest support among the circuit courts for upholding the private, unsupervised release of ADEA claims.

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36. *Id.* at 1089.

37. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 198 (4th Cir. 1990).

38. 583 F. Supp. 1357 (W.D. Pa. 1984).

39. *See also* Handley v. Phillips, 715 F. Supp. 657 (M.D. Pa. 1989) (collective bargaining agreement for binding arbitration of suspension and termination of employees did not preclude plaintiff's rights to file ADEA claim).

40. EEOC v. United States Steel Corp., 583 F. Supp. 1357, 1361 (W.D. Pa. 1984).

In *Runyan v. National Cash Register Corp.*,[41] the court held that there is not an absolute bar to release of claims under the ADEA, even though FLSA enforcement provisions have been incorporated into the act. The court stressed that the ADEA "addresses itself to an entirely different segment of employees [than the FLSA], many of whom were highly paid and capable of securing legal assistance without difficulty,"[42] as opposed to the group protected by the FLSA, which mainly consists of lower paid, less educated employees with little understanding of their legal rights. The court approved of the "practice, even if not officially sanctioned, . . . that permits effectuating and recognizing settlements of ADEA disputes that employees and employers have worked out in good faith without [EEOC] agency involvement."[43] In that case the plaintiff was an experienced labor lawyer who was age fifty-three when he was hired, and fifty-nine when let go for unsatisfactory performance. The employee mentioned at the time of his termination that he felt it was related to age discrimination but still signed a waiver agreement. The court justifiably refused to let the plaintiff use an ambiguity in the ADEA to take advantage of his employer. Furthermore, the *Runyan* court held that the waiver applied to ADEA claims even though the agreement did not explicitly refer to ADEA claims, basing its decision on ordinary contract principles.[44]

The *Runyan* court took a much more practical approach to the ADEA waiver issue by looking at the particular facts of the case to determine if an unsupervised release of a claim is valid under the particular circumstances of the case. In *Lancaster v. Buerkle Buick Honda Co.*, the Eighth Circuit considered relevant the fact that the plaintiff in an ADEA waiver case "was a well-paid management employee who ha[d] experience in business and who ha[d] signed numerous contracts in his lifetime" in upholding the waiver signed by the employee.[45]

A similar case-by-case analysis should be used in cases involving agreements to arbitrate employment disputes. In *Nicholson* the court took little notice of the fact that the plaintiff was an experienced attorney and had been an executive with the company for twenty-five years. The common fears of disparity of bargaining power and lack of legal expertise

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41. 787 F.2d 1039 (6th Cir. 1986), *cert. denied*, 479 U.S. 850 (1986). *See also* Shaheen v. B.F. Goodrich Co., 873 F.2d 105 (6th Cir. 1989); Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 482 U.S. 928 (1987); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986).

42. Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039, 1043 (6th Cir. 1986).

43. *Id.*

44. *Id.* at 1044, n.10.

45. 809 F.2d 539, 541 (8th Cir. 1987).

were clearly not present in the case. Furthermore, there was no evidence of coercion or threats of termination for failure to sign the arbitration agreement.

In *Goff v. Kroger Co.*,[46] while refusing to grant the defendant employer a summary judgment enforcing an arbitration agreement, the court nonetheless stated that courts must consider the particular circumstances of each case carefully to determine whether the release of plaintiff's rights under the ADEA were knowingly and deliberately waived. In discussing *Runyan*, the court stressed the importance of the fact that the plaintiff was an experienced labor lawyer.[47]

The EEOC has approved of private, unsupervised waivers of ADEA claims if they meet the following requirements: they are knowing and voluntary, they do not provide for the release of prospective rights or claims, and they are not in exchange for consideration that includes employment benefits to which the employee is already entitled.[48] While these guidelines may not allow for the automatic approval of all waivers or agreements to arbitrate, they are a clear indication by the agency that private waivers of ADEA claims are appropriate under certain circumstances.

The EEOC considers the following as relevant factors of the "voluntary and knowing" standard: "(i) if the agreement was in writing, and in understandable and clear language; (ii) whether a reasonable period of time was provided for employee deliberation; and (iii) whether the employee was encouraged to consult with an attorney."[49] If the EEOC, the ADEA's enforcement agency, is willing to make automatic approval of waivers in these circumstances, the courts should certainly consider the circumstances in individual cases where similar factors exist under an agreement to arbitrate instead of a total waiver. It seems evident that the EEOC does not share the *Nicholson* court's fear that all compliance with the ADEA must be overseen by the EEOC.[50]

Furthermore, while the ADEA itself encourages the EEOC to first attempt to effect voluntary compliance with the statute "through informal methods of conciliation, conference, and persuasion,"[51] the *Nicholson* court bars enforcement of a voluntary agreement between the employer

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46. 687 F. Supp. 1189 (S.D. Ohio 1988).

47. *Id.* at 1192.

48. 29 C.F.R. § 1627.16(c)(1) (1990). *But see* Pub. L. No. 100-459, Title 5, 102 Stat. 2216 (1988) (expired Sept. 30, 1989, wherein Congress suspended these EEOC rules by using appropriations bills).

49. *Id.* § 1627.16(c)(2).

50. Nicholson v. CPC Int'l Inc., 877 F.2d 221, 237 (3d Cir. 1989) (Becker, C.J., dissenting).

51. 29 U.S.C. § 626(b) (1988).

and employee to settle the dispute through arbitration when an employee later decides to bring an ADEA action in violation of that agreement.

IV. LEGISLATIVE LANGUAGE, HISTORY, AND PURPOSE OF ADEA

Since there is no explicit language in the ADEA as to the arbitration of claims, courts and commentators turn to the legislative history of the Act. Opponents of arbitration agreements and private waivers of ADEA claims argue that by placing enforcement powers in the EEOC, Congress meant to cut off any avenues bypassing this agency involvement. However, these opponents ignore the fact that "the individual's right under [the] ADEA to seek redress against an employer for age discrimination is subordinate to the enforcement activities of the public agency charged with the Act's administration."[52] What these opponents forget is that a waiver or a private agreement to arbitrate does not conflict with congressional intent to bar discrimination on the basis of age, because the individual's agreement bars only his own recovery in private suits or in an EEOC suit on his behalf. The EEOC still has the statutory responsibility to eliminate age discrimination in employment and pursue charges against an employer. Thus, an employer's agreement to arbitrate ADEA claims does not interfere with the EEOC's statutory enforcement powers.

In *Gilmer*, the court emphatically stated that:

> We find nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements. . . . Courts should be reluctant, however, to imply in a statute an intention to preclude enforcement of arbitration agreements where Congress has not expressed one, particularly in light of countervailing intention expressed by Congress in the FAA.[53]

While Congress made a deliberate decision to make ADEA claims enforceable under the FLSA, ADEA is a separate statute with separate goals for protecting a different class of persons; therefore, it must be analyzed separately. In ADEA cases, the plaintiff may be a well-educated, long-term employee, who in fact has the ability and desire to reach an individual agreement with his employer.[54] The *Runyan* court

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52. Nicholson v. CPC Int'l Inc., 877 F.2d 221, 225 (3d Cir. 1989).

53. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195, 197 (4th Cir. 1990).

54. *See* Comment, *supra* note 32, at 1078 (citing Schuster & Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 INDUS. & LAB. REL. REV. 64, 68 (1984)).

stated that ADEA cases may be "very different from cases concerning releases of FLSA claims by lay persons seeking payment of minimum wages, in amounts ascertainable by uncomplicated methods, usually with little knowledge of their legal rights."[55] Furthermore, a blanket disallowance of arbitration agreements of ADEA claims may be an overprotective move by the court, based on the court's view of the disparity of bargaining power between employers and employees. This problem may not be as pervasive with older employees as is the case in other employment disputes; however, when it is present, the facts can be analyzed on a case-by-case basis.

In *Nicholson*, the plaintiff was an attorney employed by the company for twenty-five years. It is difficult to justify the court's overall ban of arbitration agreements, especially when applied to the facts of this case. Many cases exist in which an individual employee has made an informed, educated decision to arbitrate claims and then later changed his mind for an unjustified reason and brings an ADEA suit. To make such a general rule of law as the court did in *Nicholson* oversteps the boundaries of judicial power.

The *Nicholson* court's reliance on the *Barrentine*, *Alexander*, and *McDonald* line of cases seems inappropriate. First, those cases do not apply to the ADEA. Congress made a deliberate decision to exclude age from Title VII coverage and obviously recognized the special characteristics that separate age from other protected classes as well as from those classes covered by FLSA and § 1983.[56] Furthermore, agreements to arbitrate ADEA claims deserve a more careful analysis in light of the Supreme Court's strong endorsement of arbitration in the commercial setting. *Mitsubishi*, *McMahon*, and *Rodriguez* were all decided after the employment cases on which the majority in *Nicholson* relies. The *Nicholson* court seems to base its decision on past employment cases not entirely on point, instead of looking at the particular purposes of the ADEA and the growth in the acceptance and sophistication of arbitration by the Supreme Court and the legal community.

V. PUBLIC POLICY CONSIDERATIONS

Since neither the ADEA nor its legislative history gives a clear picture of whether ADEA rights can be privately released by individual agreements to arbitrate, the courts should consider the public policy

55. Runyan v. Nat'l Cash Register, 787 F.2d 1039, 1044 (6th Cir. 1986).

56. *See* EEOC, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 8, 14 (1981).

ramifications of its decisions. The Act was intended to outlaw arbitrary, unjustified employment discrimination against older workers and was aimed toward expanding job opportunities for those individuals. The ADEA was not intended to take away freedom of choice and contract from older workers, many of whom are fully capable of negotiating with their long-term employers.

ADEA sponsors encouraged informal resolution of ADEA claims.[57] The statute contains no language prohibiting private agreements, but the *Nicholson* court seems to cut off the agreement-to-arbitrate option of older workers and their employers. Sponsors stated that the ADEA should allow the employee "to resolve the dispute *himself* or work out a compromise with an employer."[58] Another sponsor pointed out the huge backlogs and long delays of the EEOC, and stressed that these delays are even more unfortunate in the case of "older citizens to whom, by definition, relatively few productive years are left."[59] It seems contrary to the interests of the older workers, whom the legislation was designed to protect, that courts have construed the ADEA to prevent them from reaching "voluntary and knowing" agreements with their employers.

It must be noted that age is neither a "suspect class" nor is it an "immutable characteristic," such as race or national origin, that warrants heightened scrutiny by the courts. As stated by one court:

> The progression of age is a universal human process. In the very nature of the problem, it is apparent that in the usual case, absent any discriminatory intent, discharged employees will more often than not be replaced by those younger than they, for older employees are constantly moving out of the labor market, while younger ones move in. This factor of progression and replacement is not necessarily involved in cases involving the immutable characteristics of race, sex and national origin. Thus, while the principal thrust of the Age Act is to protect the older worker from victimization by arbitrary classification on account of age, we do not believe Congress intended automatic presumptions to apply whenever a worker is replaced by another of a different age.[60]

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57. 29 U.S.C. § 626(b).

58. *The Age Discrimination in Employment Waiver Protection Act of 1989 Committee on Labor and Human Resources Report together with Minority Views*, 101st Cong., 1st Sess., Rep. 79, at 32 (1989) (minority view of Senators Hatch, Jeffords, Thurmond, Durenberger, and Coats *quoting* 123 Cong. Rec. S. 17275 (daily ed. Oct. 19, 1977) [hereinafter *Waiver Act Report*]) (emphasis in original).

59. *Id. (quoting Age Discrimination in Employment: Hearings on S. 830 and S. 786 Before the Subcommittee on Labor of the Senate Committee on Public Welfare*, 90th Cong., 1st Sess. 24-25 (1967)).

60. Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975).

Therefore, while the policy of the ADEA is obviously to protect older workers, the Constitution limits the degree of protection courts or Congress can provide before jeopardizing employee benefits, precluding knowing and voluntary choices, or limiting the opportunities for agreements to arbitrate or waivers available to older workers.

The *Nicholson* court seemed to forget that employers are not without limits on their rights to obtain arbitration or waiver agreements from employees: first, the agreements must be voluntary and knowing; second, the EEOC still has the statutory right to enforce ADEA violations even in light of a waiver of employee rights; and third, there is an opportunity for limited judicial review of arbitrators' decisions.

Courts should establish standards to determine if arbitration agreements signed by older employees are indeed voluntary and knowing. The following factors, put forth by the Third Circuit in determining the validity of waivers, could also be applied to agreements to arbitrate:

(1) The clarity and specificity of the release language.
(2) The plaintiff's education and business experience.
(3) The amount of time the plaintiff had for deliberation with respect to the release before signing.
(4) Whether the plaintiff knew or should have known his rights upon execution of the release.
(5) Whether the plaintiff was encouraged to seek, or in fact received benefit of, counsel.
(6) Whether there was an opportunity for negotiation of the terms of the agreement.
(7) Whether the consideration given in exchange for the waiver and accepted by the employee exceeded the benefits to which the employee was already entitled by contract or law.[61]

Furthermore, the Federal Arbitration Association (FAA) provides four opportunities for judicial review in which a court may vacate an arbitrator's award:

(1) Where the award was procured by corruption, fraud, or undue means.
(2) Where there was evident partiality or corruption in the arbitrators.
(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

61. Cirillo v. Arco Chem. Co., 862 F.2d 448 (3d Cir. 1988).

> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter was not made.[62]

Thus, an older employee who signs an agreement to arbitrate is not giving up his substantive ADEA rights; he is merely submitting the dispute to an arbitrator instead of a court.

VI. CONCLUSION

The language, history, and public policy considerations of the ADEA do not justify a *per se* rule that bars arbitration agreements in which employees waive their right to file a private ADEA claim. The *Nicholson* court's holding that arbitrary agreements are inherently inconsistent with the statutory scheme for enforcement of the ADEA and thus, age discrimination claims are not subject to arbitration, is an overstepping of judicial authority. The court failed to properly balance the rights of employees and employers to make voluntary and knowing agreements against the desire to protect older employees and the rationale of the ADEA. As one opponent of such drastic outlawing of agreements said, "[p]recluding settlement simply because they might insulate a potential wrongdoer from a possible adverse judicial finding would appear largely inconsistent with the generally accepted notion that the voluntary resolution of disputes between parties in the employment context is preferable to litigation."[63]

The interests of older workers must also be considered in light of the reality of tremendous backlogs of charges filed with the EEOC and the already overburdened courts. The *Nicholson* court should have also considered that employers may now be discouraged from offering early-retirement packages to workers in the absence of assurances of protection from ADEA suits, resulting in an obvious detriment to older workers. Furthermore, the older workers who were to be protected by the ADEA are now precluded from negotiating on their own behalf and making certain agreements with their employers. This result seems to perpetuate societal attitudes that older people cannot function on their own -- which is precisely one of the stereotypes the ADEA was designed to eliminate.

The absence of language in the ADEA banning private agreements and the individual's right to make contracts conflicts with the *Nicholson* court's destruction of private arbitration agreements. Until Congress decides to clear up the ambiguity in the ADEA, the courts should decide on a case-by-case basis whether the employee in fact made a voluntary

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62. 9 U.S.C. § 10 (1982).

63. *Waiver Act Report*, *supra* note 58, at 30.

and knowing agreement to waive his private ADEA rights and subject them to arbitration, which should be upheld by the courts. The Supreme Court will hopefully clear up this issue when it hears *Gilmer*.[64]

Ellen Toth

64. *See* note 10, *supra*.